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Supreme Court of the United States

No. 203 —October Term, 1952

In the Matter

of

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Debtor.

THE CITY OF NEW YORK,

Petitioner,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable The Supreme Court of the United States:

The petition of the City of New York respectfully shows:

1. Your petitioner is a municipal corporation organized and existing under and by virtue of the laws of the State of New York.

2. The respondent is The New York, New Haven and Hartford Railroad Company which was reorganized in proceedings brought pursuant to § 77 of the National Bankruptcy Act (11 U. S. Code, Chap. 8, § 205) in the United States District Court for the District of Connecticut, Docket No. 16562.

Statement of Matter Involved

3. Prior to October 23, 1935, the date of the filing and approval of the Petition in Reorganization, and between June 8, 1894 and January 15, 1930, various assessments for local improvements were levied by the City of New York, which became *in rem* liens (with no accompanying *in personam* obligation) on specific parcels of real property owned by the New York, New Haven and Hartford Railroad Company (6-7, 19-51, 84, 315-316).* The principal amount of these liens is $134,153.94 (84). Together with interest to December 31, 1950, just prior to the argument of this matter in the District Court, there was due to the City $503,807.86 (*Ibid.*). On June 30, 1952, there was due to the City for principal and interest $517,894.02. All of these parcels of real property are located in the Borough and County of Bronx, City and State of New York (6). These assessments, all set forth in Exhibit A attached to the petition of the railroad company in the present proceedings, were levied and became specific liens, pursuant to and in conformity with applicable provisions of the Charter of the City of New York in existence at the time of each respective assessment levy and are enforceable exclusively, and by proceedings *in rem* only, against the specific parcels affected (84, 88-89, 315-316). Until paid each assessment lien is a first, prior and paramount lien against the parcel affected, and is preferred in payment to all other charges (89, 317).

4. At no time during the course of the reorganization proceedings, which were terminated on September 11, 1947, by the Consummation Order and Final Decree of the District Court, did the City file a claim for its assessment liens (323). On the other hand, at no time during the course of the reorganization proceedings were the assessment liens

* References are to folios of the Record unless otherwise indicated.

specifically brought into question before the District Court by the Debtor or its Trustees (58). No specific bar order was ever served upon the City of New York and no application was ever made in the District Court to determine the validity of these liens (*Ibid.*). On November 2, 1950, over three years after the reorganized Debtor on September 18, 1947 took title to this property by deed from the Trustees, the Railroad Company petitioned the District Court in this ancillary proceeding for instructions as to whether the Plan of Reorganization and the Consummation Order and Final Decree, under which it took title, required it to pay or assume any of the assessment liens in question, and in the event such instructions were in the negative, the Court was asked to declare that the Railroad's property was free and clear of the City's assessment liens. The Railroad also asked that the assessment liens thereupon be cancelled, discharged and removed of record (14-15).

5. After a hearing before Hon. CARROLL C. HINCKS, District Judge, the Railroad's petition was granted in all respects and its real property involved herein was declared free and clear of the City's assessment liens. The City was further directed to cancel, discharge and remove of record all of the said assessments and the liens therefor (289-294).

6. Upon appeal by the City to the United States Court of Appeals for the Second Circuit, that Court, on the opinion of the District Court, affirmed the order appealed from, FRANK, C. J., dissenting (pp. 120-134).

7. The majority of the Court of Appeals, adopting the views of the District Court, in effect held that the City of New York was a creditor within the purview of § 77 of the National Bankruptcy Act. The Court held that the City's failure to file a claim for its assessment liens within the period provided for in a general bar order in which the City was not specifically named as a creditor, and of which the City of New York received no notice except that

constructively supplied by publication, constituted a bar to the City's right to participate in the assets of the Railroad. Thus, it concluded, the reorganized Railroad Company acquired the railroad property free and clear of the City's assessment liens (323-324, 336-337).

8. The dissenting opinion of Judge FRANK pointed out that the question whether a taxing authority holding specific *in rem* tax liens, such as those here involved, is a "creditor" within the compass of § 77 of the National Bankruptcy Act, has not been decided definitively by this Court (p. 132). The dissent said that in fact the decision of the majority below is the first holding that such a taxing authority is such a creditor (*Ibid.*). Assuming, without apparently conceding, that the City is such a creditor, the dissenting Judge nevertheless found, on the authority of *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950), that the City of New York was deprived of its assessment liens without due process, on the theory that constructive notice by publication of a general bar order requiring the filing of claims without more, will not effectively operate to bar the claim of a creditor whose name and address are known to the Debtor and its Trustees (pp. 125-126).

Jurisdiction and Timeliness

9. The petition is made under 28 U. S. Code § 1254(1), and the Court has jurisdiction to grant the writ. The appeal to the Court of Appeals from the District Court was taken pursuant to § 24 of the National Bankruptcy Act (11 U. S. Code, Chap. 4, § 47).

10. The decision of the Court of Appeals was handed down on June 5, 1952, and the order thereon was entered on the same day. This petition is, therefore, timely. Issuance of the mandate has been stayed pursuant to stipulation entered into between counsel, and approved by order of Hon. AUGUSTUS N. HAND, a Judge of the United States Court of Appeals for the Second Circuit.

Statutes Involved

11. Section 77 of the Bankruptcy Act (11 U. S. Code, Chap. 8, § 205) contains, among other provisions, certain definitions to be used for the purposes of that section, which are germane to the issues here involved.

12. The pertinent provisions, as they now appear in § 77, are the same as they were on August 27, 1935 (49 U. S. Stats. 911-926), when the Congress made substantial amendments to § 77 as originally enacted on March 3, 1933 (47 U. S. Stats. 1474-1482).

13. Subdivision (b) of § 77 now provides in part as follows:

> "The term 'creditors' shall include, for all purposes of this section all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act, including the holder of a claim under a contract executory in whole or in part including an unexpired lease.
>
> "The term 'claims' includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character."

14. The comparable provisions of § 77(b) as enacted in 1933 read as follows:

> "The term 'creditors' shall, except as otherwise specifically provided in this section, include, for all purposes of this section and of the reorganization plan, its acceptance and confirmation, all holders of claims, interests, or securities of whatever character against the debtor or its property, including claim for future rent, whether or not such claims, interests, or securities would otherwise constitute provable claims under this act."

15. No definition of the word "claims" was included in § 77 as originally enacted in 1933. The definition of the word "claims" which now appears in the statute was first added thereto by the amendatory legislation in 1935.

16. Section 77 also provides at subdivision (c)(4) as follows:

> "(4) The judge shall require the officers of the debtor or the trustee or trustees, at such time or times as the judge may direct, and in lieu of the schedules required by section 7 of this Act, to file with the court such schedules and submit such other information as may be necessary to disclose the conduct of the debtor's affairs and the fairness of any proposed plan; and shall direct the officers of the debtor, or the trustee or trustees, within such time as the judge shall set, to prepare and file with the court a list of all known bondholders and creditors of the debtor, and the amounts and character of their debts, claims, and securities, and the last known post-office address or place of business of each bondholder and creditor, and a list of all known stockholders of the debtor, with the last known post-office address or place of business of each, which lists the judge may require to be brought down to date at any time. The contents of such lists shall not constitute admissions by the debtor or the trustees in a proceeding under this section or otherwise."

17. Section 77 further provides at subdivision (c)(7) as follows:

> "(7) The judge shall promptly determine and fix a reasonable time within which the claims of creditors may be filed or evidenced and after which no claim not so filed or evidenced may participate except on order for cause shown, the manner in which such claims may be filed or evidenced and allowed, and for the purposes of the plan and its acceptance, after notice and hearing, the division of creditors and stockholders into classes according to the nature of their respective claims and interests."

18. Lastly, § 77 provides at subdivision (c)(8) as follows:

> "(8) The judge shall cause reasonable notice of the period in which claims may be filed, of hearings on application for the dismissal of the proceedings, or for the final allowance of fees or expenses to be given creditors and stockholders by publication or otherwise."

The Questions Presented

19. The first question presented is whether, contrary to the historical treatment of tax liens in bankruptcy, the holder of *in rem* tax liens (for which no personal liability exists), which were imposed upon specific parcels of the Debtor's real property prior to the inception of proceedings to reorganize such Debtor under § 77 of the National Bankruptcy Act, is a creditor within the meaning of subdivision (c)(7) thereof.

20. If the first question is answered affirmatively, then the second question presented is whether, under the provisions of § 77(c)(8) of the National Bankruptcy Act requiring "reasonable notice" to a creditor "of the period in which claims may be filed", such reasonable notice is afforded to a creditor, whose name and whereabouts are known to the Debtor and its trustees, merely by publication of a notice to file claims pursuant to a general order requiring such filing, particularly where the creditor is not named, either in the general order or the published notice.

Opinions Below

21. The opinion of the District Court (307-345) is unreported. The majority of the Court of Appeals affirmed the order of the District Court on the opinion below, Judge FRANK dissenting in a separate opinion (pp. 120-134). The opinions of the Court of Appeals are also unreported.

22. The opinion of the District Court, which was adopted by the majority of the Court of Appeals, held that the City of New York, the holder of the *in rem* assessment liens in question, was a creditor of the Debtor in reorganization within the meaning of § 77(b) of the National Bankruptcy Act (321). It reached this conclusion in complete reliance upon what the Court itself admitted to be dictum contained in *Gardner* v. *New Jersey*, 329 U. S. 565, 573 (1946) (*Ibid.*). It then held that the failure of the City of New York to file a claim for its assessment liens in the reorganization proceedings, pursuant to a general notice to creditors served constructively by publication only, barred the City from participating in the reorganization proceedings and operated effectively to discharge the City's assessment liens (323-324, 336-337). In so holding, the Courts below went further than this Court or any other court had to that moment gone in the treatment of statutory tax liens in proceedings under the National Bankruptcy Act (see dissenting opinion, FRANK, C. J.—p. 132).

23. In the District Court, the City urged, on the authority of *DeLaney* v. *City and County of Denver*, 185 F. 2d 246 (U. S. C. A., 10th Cir., 1950), that in *any* proceeding under the National Bankruptcy Act, a statutory tax lienor may rely upon his lien and need file no claim therefor. The District Court denied the applicability of the *DeLaney* case, first, because it involved an ordinary bankruptcy and, second, because, in the Court's opinion, the principle of law stated in the *DeLaney* case and urged by the City is valid only when the liened property is in the possession of the creditor (337-340). The latter conclusion was reached by the District Court in reliance upon its construction of this Court's decision in *U. S. Bank* v. *Chase Bank*, 331 U. S. 28 (1947) (339-340). In the Court of Appeals the City called attention to *Clem* v. *Johnson*, 185 F. 2d 1011 (U. S. C. A., 8th Cir., 1950) which reiterated the rule that a filing of a claim in bankruptcy is not essential to the preser-

vation of a lien whether or not the liened property is in the possession of the lienor, and expressly approved the decision in the *DeLaney* case. The City also pointed out that the qualification added to the rule of the *DeLaney* case by the District Court was urged upon the Court of Appeals in the *Clem* case and there rejected, on the express ground that no such qualification was intended by the decision in the *United States Bank* case. By adopting the District Court's opinion, the Court of Appeals necessarily construed this Court's decision in the *United States Bank* case in a manner which conflicts with the construction given that case by the Court of Appeals in the Eighth Circuit in the *Clem* case.

24. The District Court answered the City's argument that it was entitled to notice at least equivalent to that furnished to mortgage trustees (who received notice of the general bar order by mail), by stating that "it would be preposterous to construe the substantive provisions of a plan confirmed in 1945 by reference to the terms of an *ex parte* administrative order of notice entered in 1936 before any plan at all had been formulated" (330). It further excused its failure to classify the City of New York as a creditor in Order No. 736 made March 13, 1944, apparently in compliance with § 77(c)(7), by its statement that the absence of any approved claim by the City was the real reason for not including the City in the classification order (331-332).

25. The Court also found that the City's arguments that the entire reorganization proceedings were not intended materially or adversely to affect the assessment liens of the City did not have sufficient substance to alter the conclusion that it was the intent of the Plan that the reorganized company should take free and clear of all claims not filed in the reorganization proceedings, including those of the City (336-337).

26. In essence, the City's position in the District Court was that the general notice to file claims served, if at all, upon the City by publication, violated the basic requirements of due process, in that it failed to give the City the reasonable notice which, under the statute, it was entitled to receive. The District Court, however, held that its intention was to bar all creditors who did not file claims pursuant to its general bar order and that the City was chargeable with knowledge that if its claim was not filed it might not participate (346-347).

27. This lack of due process was most forcibly pointed out in the dissenting opinion of Judge FRANK in the Court of Appeals (pp. 121-134). He did not discuss the primary contention of the City, i.e., that it was not a creditor within the meaning of § 77, except to point out that that question had not been decided until the determination in this case (p. 132). He would, however, have ruled for the City of New York solely upon the ground that the notice to file claims was completely ineffective in so far as the City was concerned because, following *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950), constructive notice by publication upon a creditor whose name and address is known to the debtor does not satisfy the requirements of due process (pp. 125-126). He pointed out that the specific provisions of § 77(c)(8) require the Court to give "reasonable notice" of its order to file claims; that this reasonable notice should have been directed to those creditors whom the debtor was first required to list by § 77(c)(4); that such a list of creditors would necessarily have contained the name of the City of New York, because the statute requires the listing of all known claims, disputed or not (pp. 123-124). He criticized severely the procedure by which the District Court permitted the Debtor to foreclose the disputed claim of the City of New York simply by failing to list it (pp. 123, 128). In short, the dissenting opinion points out that the courts below substituted the

City's knowledge that the reorganization proceedings were pending for the requirements of the statute that it be afforded reasonable notice of the necessity to file a claim for its assessment liens (p. 130).

28. The dissenting opinion further pointed out that the need for something more than constructive notice to file claims was increased by the fact that this Court has never ruled that the validity of an *in rem* tax lien restricted to a particular property may be adjudicated in a railroad reorganization proceeding without specific notice to the taxing authority (p. 132).

29. As further evidence of the necessity for something more than constructive notice, the dissenting Judge pointed out that the City might well have been justified in concluding that the Plan of Reorganization was not intended to affect its assessment liens and that it could rely on this unless and until it received specific notice of such intention (pp. 132-134).

30. Finally, the dissenting Judge expressed doubt as to whether the District Court properly engaged in an interpretation of the Plan of Reorganization and its orders in their effect on the City's claims. He stated that federal jurisdiction is patently but ancillary and of a kind to be exercised only under unusual circumstances. The dissenting Judge found no such unusual circumstances in this case (p. 134).

Assignment of Errors

31. The petitioner submits that the Court of Appeals erred:

(a) In holding that the City of New York was a creditor of the Debtor in reorganization within the meaning of § 77(b) of the National Bankruptcy Act.

(b) In holding that the provisions for notifying creditors of the time within which claims were to be filed, contained in Order No. 32 of the reorganization proceedings, constituted reasonable notice to the City of New York within the meaning of § 77(c)(8) of the National Bankruptcy Act.

(c) In holding that the City's assessment liens could be discharged without specific notice directed to the City of intention to adjudicate their validity.

(d) In failing to find that the Plan of Reorganization under which the Debtor was reorganized was not intended materially or adversely to affect the City's assessment liens.

(e) In failing to find that the discharge of the City's assessment liens by the method adopted in the District Court constituted a deprivation of the City's property without due process of law.

(f) In failing to find that the District Court, after the making of the Plan of Reorganization and the Consummation Order and Final Decree, improperly exercised ancillary jurisdiction to interpret the same.

(g) In affirming the order of the District Court.

Reasons for Granting the Writ

32. The decisions of the Court below have decided an important question of Federal law which has not been settled by this Court. In holding that the City of New York is a creditor within the meaning of § 77(b) of the National Bankruptcy Act, the District Court relied on what that Court characterized as dictum contained in *Gardner* v. *New Jersey*, *supra*. As was pointed out in the dissenting opinion of Judge FRANK in the Court below, the holding of the Court of Appeals is the first adjudication that exclusively *in rem* tax lienors whose liens are restricted to particular properties are required to file claims in a

railroad reorganization proceeding in order to preserve their liens. This question has not been decided by this Court and was not decided in the *Gardner* case. That case dealt with *in personam* tax obligations secured by a general lien on all of the debtor's property within the state. The railroad reorganization proceeding in the *Gardner* case was intentionally brought to test the validity of the state's taxes and the taxing authority voluntarily appeared therein. The opinion of the Court below decides an important question of Federal bankruptcy law, which, the petitioner respectfully submits, should be settled by this Court.

33. Furthermore, and aside from its novelty, the question presented is of importance in the administration of Federal bankruptcy law. The decision of the Court below constitutes a holding that in railroad reorganization proceedings taxing authorities which impose *in rem* tax liens against specific properties fall into the same category as general creditors of the debtor. As such, the Court holds, they may be barred by a general order requiring the filing of claims. This is a complete departure from the treatment heretofore accorded to *in rem* tax liens in proceedings under the National Bankruptcy Act. In ordinary bankruptcy proceedings, it has always been the rule that the filing of a formal claim is not essential to the preservation of a statutory tax lien; that, indeed, the lienor need file no claim at all but may rely solely upon his lien. *DeLaney* v. *City and County of Denver, supra; In re Harvey,* 122 Fed. 745 (D. C., E. D. Pa., 1903). In railroad reorganization proceedings, no statutory tax lien had heretofore been affected except upon specific notice to the taxing authority or following upon its voluntary appearance in the reorganization proceedings. *Gardner* v. *New Jersey, supra; In re Denver & R. G. W. R. Co.,* 23 F. Supp. 298 (D. C., D. Colo., 1938). If the decision of the Court below is permitted to stand it will impose upon taxing authorities

the affirmative obligation to ascertain the names and addresses of each owner of each separately assessed parcel of land, presumably after a search of title, and to recognize and identify the names of such property owners in notices of bankruptcy proceedings acquired after tracking down all such bankruptcy records in all the United States District Courts. This, as Judge FRANK pointed out in his dissenting opinion below, would be an insupportable burden upon taxing authorities (p. 127). Settlement of the question by this Court is plainly in the public interest since it is likely to be presented in any bankruptcy or railroad reorganization proceeding, and necessarily involves the rights of all taxing authorities in this country whose only method of enforcing the collection of real estate taxes and assessments is the imposition of *in rem* liens upon the properties assessed.

34. The decision of the Court below involves a direct conflict with decisions of the Courts of Appeals in the Eighth and Tenth Circuits, viz., *DeLaney* v. *City and County of Denver, supra,* and *Clem* v. *Johnson, supra.* In those cases it was held that the filing of a claim in bankruptcy is not essential to the preservation of a lien. The decision of the Court below conflicts with this familiar principle of bankruptcy law and thus gives rise to the necessity for the settlement by this Court of the disputed question. Moreover, the decision below probably extends the holding of this Court in *United States Bank* v. *Chase Bank, supra,* beyond its original intendment. In *Clem* v. *Johnson, supra,* the holding in the *United States Bank* case was restricted to the facts in that case, which presented a situation where a lienor sought to participate in the general estate of the bankrupt and also to protect the security of his lien. The Court below, adopting the opinion of the District Court, read the *United States Bank* case as holding that only a lienor in possession of the liened property need not file a claim in bankruptcy in order to preserve his lien. It is respectfully submitted that *in rem* tax lienors, such as the

City of New York, are entitled to know from this Court whether they may no longer rely upon heretofore settled practice but are now compelled to file claims in preservation of their tax liens, simply because the liened real property has not been reduced to the lienor's possession.

35. Finally, the Court below has approved the procedure adopted by the District Court whereby, in direct violation of the applicable statute requiring the giving of reasonable notice to creditors of the time within which to file claims, the District Court directed the service of such notice exclusively by publication upon all creditors other than the holders of mortgage liens and such others as had appeared in the proceedings. This appears to be in conflict with the decision in *Mullane v. Central Hanover Bank & Trust Co., supra,* which holds that constructive notice by publication does not constitute due process where the party intended to be reached thereby and his whereabouts are known to the person giving the notice. In this case the City of New York, admittedly known to the Debtor at all times, was deprived of its property without due process of law, when it was held to be barred by an order to file claims of which it received only constructive notice by publication. It is respectfully submitted that this Court should exercise its inherent power of supervision over the administration of the Federal District Courts and decide whether a statutory tax lien may be discharged for failure of a taxing authority *known to the debtor* to comply with the provisions of a general bar order of which it receives constructive notice only.

CONCLUSION

WHEREFORE, your petitioner prays that a writ of certiorari issue to the Court of Appeals for the Second Circuit to the end that the errors aforesaid may be corrected by this Court.

New York, N. Y., June , 1952.

Respectfully submitted,

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